No. 3540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM E. GOWLING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF FACTS.

The plaintiff in error, hereinafter called the defendant, was convicted on the 25th day of May, 1919, in the District Court for the Northern District of California, of violating the Act of June 25, 1910, commonly called the "White Slave Traffic Act," in transporting for immoral purposes a woman, by means of an automobile, from Reno, in the State of Nevada, to Sloat, in the State of California.

The defendant was indicted and convicted upon five counts under Section 2 of the Act. The only difference between the various counts was the purpose for which the defendant transported the woman.

The defendant contends that the indictment under which he was convicted did not state an offense under the provisions of the Act of June 25, 1910, in that it is not charged that the transportation was in interstate commerce within the meaning and intent of the Act nor that it was by means of a common carrier. The other contentions of the defendant have to do with the instructions of the court and the ruling of the court upon the admissibility of evidence and the argument of counsel for the prosecution.

ARGUMENT.

I.

Interstate commerce, among other things, includes the passage of persons or property from one state to another, and it is not necessary in order to sustain an indictment under Section 2 of the Act of June 25, 1910, that the Government either allege or prove that the vehicle or means of transportation was a common carrier.

United States vs. Burch, 226 Fed. 974.
United States vs. Rider, 226 Fed. 974.

> "And the transportation of persons has long been held to be commerce. Interstate commerce then is, among other things, the passage of persons or property from one state to another. It

does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare. Interstate commerce being, therefore, in so far as applicable here, the passage of persons from one state to another, the declaration of the act, 'that any person who shall transport any woman in interstate commerce,' is equivalent to the declaration 'that any person who shall transport any woman from one state to another.' It was any transportation from state to state, for the purposes mentioned, that Congress intended to prohibit, and did prohibit, and not such transportation by common carrier alone. In these days it is just as easy to transport a woman or girl by automobile as by rail, and the former method may in many cases be much more expeditious and clandestine than the latter. It is true that the courts will not extend the language of an act so as to embrace cases that do not come within its terms; but, on the other hand, they are not authorized to limit the application of the words used, so as to exclude cases that fall within their ordinary meaning, and are fully within the evil which the act was intended to cure."

Wilson vs. United States, 232 U. S. 563, 58 L. Ed. 728.

"But, in our opinion, in order to constitute an offense under the act it is not essential that the transportation be by common carrier. The statute reads: 'That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce,

* * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, * * * or who shall knowingly procure or obtain, or cause to be produced or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, * * * in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, * * * whereby any such woman or girl shall be transported in interstate or foreign commerce, * * * shall be deemed guilty of a felony,' etc.

"The prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment. As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce (*Hoke vs. United States,* 227 U. S. 308, 323; *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196, 215); and since this power is complete in itself, it was discretionary with Congress whether the prohibition should be extended to transportation by others than common carriers."

Also: Bouviers Law Dictionary, page 531.

The indictment in the case at bar charges the defendant with transporting the woman in "interstate commerce." Section 1 of the Act of June 25, 1910, itself defines the term "interstate commerce" as

including any transportation from one state to another.

> "That the term 'interstate commerce,' as used in this act, shall include transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia."
>
> Act of June 25, 1910.

The language used in Section 2 of the Act of June 25, 1910, is plain and admits of no more than one meaning, and no limitation can be implied because the duty of interpretation does not arise.

> *Caminetti vs. United States,* 242 U. S. 443, 61 L. Ed. 470.
>
> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton s. Rathbone,* 175 U. S. 414, 421; 44 L. Ed. 219, 222; 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc. in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

The defendant in the Caminetti case was charged and convicted under Section 2 of the Act of June 25,

1910, and the court was discussing the language of the indictment under that section in its opinion.

II.

There is nothing in the argument of the prosecuting attorney that was improper or calculated to prejudice the jury against the defendant.

1. The language assigned as prejudicial in specification No. 4 is the following:

> "Now, gentlemen of the jury, can you, as twelve honorable men, chosen by reason of that very fact, say that William E. Gowling, this defendant, *is innocent of the charge your government has brought against him; is innocent of sneaking into the home of his friend and relative* and there destroying the very ties that bind the husband and wife together; is innocent of taking advantage of the trust and confidence of Carleton Northcutt, who left his home and friends and relatives and all that there was—"

This language is merely the attorney's construction of the facts presented to the jury, and the following remarks of the court so indicate.

> "I think that is perfectly legitimate. An argument by counsel is based upon their theory of what the evidence shows. Now, in presenting their argument to the jury they are confined to certain limitations; they may argue things in accordance with their construction, and it is for the jury to determine whether the evidence bears it out; the point which counsel is making is entirely within the proprieties."

There was in fact no exception reserved by the defendant as to the use of this language.

2. The language assigned as prejudicial in specification No. 5 is as follows:

> *"And that is one of the cleverest things he did during the whole trial, except one which the law forbids me to mention, gentlemen of the jury."*

No sufficient exception was reserved to the ruling of the court on this language. Trans. 410.

This remark could in no way affect the rights of the defendant. The judge who tried the case could not understand the basis of the defendant's objection at the time it was made, and even counsel for the defendant admitted at that time that he did not know what was meant. We submit that a remark that is so subtle that neither the court nor counsel for the defendant could appreciate it can hardly prejudice the rights of the defendant before a jury of laymen. The following discussion at the time of the objection will illustrate this fact:

> Trans. 410. "Mr. Court: What remark? Mr. Duryea: Referring to matter he was forbidden to mention before the jury. The Court: What does he refer to? Mr. Duryea: I do not know, but I think it is a remark that is detrimental to the defendant in this case. The Court: You must explain it yourself so that I can understand you. Mr. Duryea: If counsel knows of something he does not dare refer to— The

Court: I do not understand your reasoning myself. Mr. Duryea: I do not know what he means myself."

3. The language assigned as prejudicial in specification No. 6 is as follows:

> "Now, it was stated by Mr. Duryea that there was someone here that was willing to drag this little woman through the mire of this action and brand her as a white slave, and I want to tell you that there is somebody here that is willing to do that, and that somebody is Frank Duryea and the defendant here, because she was brought here so that the defendant could hide behind her skirts, and put on that witness stand, *and she was left alone to bear the brunt of this whole proposition on that witness stand alone.*" (Ass. or Er. LX; Tr. pp. 410 to 411.)

No sufficient exception was reserved to the ruling of the court upon this matter and if there was anything prejudicial to the defendant, the instruction to the jury made by the court at the time of the objection cured it. The following quotation from the Bill of Exceptions shows that the jury was properly admonished against any possible prejudice that might arise because of the remark of counsel:

> "The Court: Well, I cannot do other than to recognize your exception. He has a reasonable limit of comment. What is the objection? Mr. Duryea: The statement that the defendant left her to bear the burden alone. The Court: If you will suggest what it refers to I will be able to rule on it. Of course, as I said this morning,

counsel are permitted to comment on the course of the trial and the character of the witnesses and the deductions to be drawn from them and matters of that kind. Now, the witness, Mrs. Northcutt, was put upon the stand in behalf of the defendant. Mr. Duryea: Certainly. The Court: Well, what is the subject of your criticism? Mr. Duryea: That she was left alone to bear the burden. The Court: There were other witnesses, Mr. Johnson; you do not mean that she was left as the sole witness. Mr. Johnson: Not as the sole witness in the case, no. The Court to Jury: Of course this is argument by counsel, and the evidence is all before you and you are not to draw any unfavorable deductions from anything that counsel says that would in anywise reflect upon the defendant's case. That is all I can say to you."

III.

The court did not err in refusing to strike out all the testimony tending to deny the legitimacy of the youngest child of Mrs. Myrna P. Northcutt for the reason (1) that no objection or motion to strike was made by the defendant at the time such testimony was received. (2) Some of the testimony was brought out by the defendant from one of his own witnesses. (3) That the testimony of parents as to the legitimacy of their children is admissible where the legitimacy of their children is not directly in issue.

1. The record shows that C. A. Northcutt, a witness for the government, in his direct testimony stated that he had two children (Trans. page 78).

Subsequently the following questions were asked and answers given:

> "The Court: Did Mrs. Northcutt have a baby with her in Riverside? A. Yes, sir. The Court: You did not take that? A. No, sir. The Court: How long had you gone to France? A. I was in France a little over seventeen months; I was away from Mrs. Northcutt about twenty months. The Court: You were away from Mrs. Northcutt about twenty months; that is, you had not seen her for twenty months up to the time of your return? A. I last saw her July 20, 1917, and January 25, 1919, was the next time. The Court: How old is this baby? A. It was born April 6, 1918; that makes it a little over a year old. *Mr. Duryea: Q. When did you last see your wife before you went to France? A. July* 20, 1917. *Q. And you had been with her about two weeks in New York up to that time? A. Approximately.*"

It will be noted that all of the evidence was brought out without objection or exception and that the last question by the representative of the defendant upon his behalf. At this point in the case it did not clearly appear that Mrs. Myrna P. Northcutt and C. A. Northcutt had more than two children as testified to by her husband when he first took the stand. The only testimony that would seem to show that they had more than two children was the following testimony by C. A. Northcutt:

> "Court: Did Mrs. Northcutt meet you at San Bernardino? A. Yes, sir, with the three children" (Trans. page 183).

It was not until Mrs. Myrna P. Northcutt, a witness called by the defendant, testified upon her direct examination that she and her husband had three children that any real doubt as to the legitimacy of the last child was raised. The following testimony was brought out on direct examination of Mrs. Myrna P. Northcutt upon behalf of the defendant:

> "I am the wife of Carlton A. Northcutt, the gentleman sitting there. We were married April 12, 1911. We have three children of that marriage. They are Laolyn Pattison Northcutt, born April 1, 1912; Lois Northcutt, she will be four years old the 10th of this coming May; and Carlton Andrew Northcutt, Jr., 1 year old on the 6th of April of this year. I last resided with my husband in New York several weeks prior and up to and including July 28, 1917, at the Great Northern Hotel. It was possibly three weeks before he sailed. I occupied the same room and same bed with him during that period and had the ordinary matrimonial or family relations with him during that period."

No objection or motion to strike out any of this testimony was made until the prosecuting attorney asked that the youngest child be brought into court as an exhibit (Trans. page 374). The objection to the presentation of the child was sustained by the court (Trans. page 376). Counsel for the defendant at this time made a motion to strike out the testimony tending to deny the legitimacy of the child, and the court said in denying the motion:

> "There is nothing to strike out. You cannot have a motion to strike out without an objection, counsel cannot stand by and have evidence go in without making their objection until after it has gone in" (Trans. page 376).

It does not seem reasonable to suppose that a defendant can permit evidence to come in without objection and then complain that he is injured by the same. Especially is this true when some of the evidence was brought out on his behalf.

3. Where the legitimacy of a child is not directly in issue, the parents are competent to testify to the fact of illegitimacy.

Melvin vs. Melvin, 58 N. H. 569.

> "It has been held that the testimony of the husband or wife to prove nonaccess, though living together, and therefore that the offspring is spurious, is incompetent upon the ground of decency, morality, and policy. * * * The authorities which support this rule are cases in which the legitimacy of children was drawn in question. The disastrous consequences that would follow the unsettling of titles to property, and the branding of legitimate children as illegitimate, have been regarded as sufficient reasons for the rule. But the mere indecency of disclosures does not in general suffice to exclude them where the evidence is necessary for the purposes of civil or criminal justice. * * * The rule does not mean that testimony of nonaccess is so obscene that it is against decency that it should be heard in court, and therefore is excluded, but the reason of it is that it is against

> sound public policy and morality to allow the husband and wife to bastardize their own issue. If the evidence were excluded because of its indecency, the same reason would exclude it when offered by other witnesses, and would prevent the wife from proving her adulterous intercourse with a third person for the purpose of procuring an order of affiliation. * * * The evidence of the libellant was not within the reason of the rule."

IV.

The instructions given by the court did not apply law not applicable to the case.

The defendant contends in his specifications from No. 7 to No. 11, inclusive, that the court in its instructions erroneously applied law which was not involved in the case. The defendant did not reserve his exception upon that ground at the time the instructions were given, and we do not believe that he sufficiently excepted to any of the instructions that are alleged to be erroneous in specifications 7 to 11, inclusive. The only language that could be meant as an exception is the following:

> "Mr. Duryea: And then I desire to reserve an exception, if your Honor please, to some instructions that were given. Of course, I cannot give the exact language but I think I can refer to them. The Court: Well, the subject matter of your exception is also necessary. Mr. Duryea: Your Honor's instruction with reference to the third provision of the Act, to the effect that it would be sufficient for a conviction

to show that the defendant induced or enticed or persuaded the woman to make the trip—as not being a part of the statue—"

Exceptions to a charge must state the grounds and must point out specifically the portion or portions of the charge excepted to.

Corpus Juris 107.

The instructions given by the court are substantially the same as those that were given and approved in the case of *Caminetti vs. United States,* 242 U. S. 443, which case also was brought under Section 2 of the Act of June 25, 1910.

The point the defendant tries to make is that the court in the case at bar instructed the jury upon a portion of the Act of June 25, 1910, under which he was not charged. This is not the case. The court in those portions of the instructions now objected to by the defendant as not applicable merely gave to the jury in a general way the scope of the Act of June 25, 1910, and then specifically limited the jury to a consideration of the law and the evidence as applicable to the charge in the indictment. The following quotations from the instructions will show that the court first gave the jury a general synopsis of the Act and then confined them to the law and evidence that was applicable to the charge in the indictment.

Trans. pages 412, 413, 415, 416:

"The defendant is on trial under an indictment charging him with a violation of what is

designated and commonly referred to as the White Slave Traffic Act, being an Act of Congress intended and having the purpose to suppress the transportation in interstate commerce of women or girls for immoral purposes and thus protect the commerce of the country from being subjected to such contaminating influence.

"The statute, as you will note, is very comprehensive on the subject of which it treats, and covers several distinct and different acts, each one of which is made a criminal offense under its provisions.

"In the first count of the indictment it is charged that on the 3rd ay of October, in the year 1918, the defendant unlawfully, wilfully, feloniously and knowingly did transport and cause to be transported and aid and assist in transporting in interstate commerce, that is to say, from Reno, in the State of Nevada, to Sloat, in the State of California, through the said Northern Division of the said Northern District of California, in and by means of a certain automobile running over the public highways of the United States, the owner of which said automobile was then and there in such transportation run, operated, driven and controlled by the said defendant, William E. Gowling, as aforesaid, a certain woman, to wit, Mrs. Myrna Northcutt, otherwise known as Mrs. W. E. Gowling, for a certain immoral purpose, to wit, for the purpose of debauchery.

"Now, that is the substance of the five different counts in this indictment. These different

counts are intended to meet the different phases of the act which I have defined to you and enable the jury to apply the evidence to the charge in an intelligent and discriminating manner and determine the facts as to the guilt or innocence of the defendant under the different phases of this act, the only difference between the counts being the specific intent alleged. You will observe that each one of these counts cover an act committed on the same date by the same means, between the same points, and with reference to the same woman, the only difference in each count being the form and the specific intent with which that act was committed, and that is permitted to be done, that character of indictment is permitted to be filed, because it cannot in many instances be known by the grand jury precisely what the evidence will disclose as the specific intent of the defendant, and so it is permitted to be charged in the various forms which are justified by the terms of the statute. It is not alleged that the transportation was for the purpose of prostitution and we have therefore no concern with that phase of the act."

It is respectfully submitted that the judgment should be affirmed.

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